

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of Paul Barber

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came on for an evidentiary hearing before Administrative Law Judge James E. LaFave on Wednesday, November 27, 2013, at the Office of Administrative Hearings in St. Paul, Minnesota. The Office of Administrative Hearings' record closed that day.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Department of Commerce (Department). Edward W. Simonet, Attorney at Law, appeared on behalf of Paul Barber (Applicant).

STATEMENT OF ISSUES

Whether the Department's denial of Mr. Barber's application for a real estate salesperson's license should be affirmed because the record demonstrates that Mr. Barber:

(1) is unqualified to act under the authority of a license granted by the Commissioner in violation of Minn. Stat. § 45.027, subd. 7 (2012); and

(2) engaged in fraudulent, deceptive, and dishonest practices in violation of Minn. Stat. § 82.82, subd. 1(b) (2012)?

SUMMARY OF CONCLUSION

The Administrative Law Judge recommends that the denial of Mr. Barber's license application be affirmed.

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Applicant, Mr. Barber, was a licensed real estate agent in Minnesota for 21 years.¹ He let his license lapse in approximately August of 2010 after spending eight months providing hospice care for his dying brother.² In the 21 years he was a practicing real estate agent, Mr. Barber had no complaints filed against him and there were no ethical charges.³ During that time, he was among the top five percent of real estate producers in the country.⁴

2. On March 2, 2012, Mr. Barber pled guilty in Ramsey County District Court to a felony for issuing dishonored checks in amounts more than \$500.⁵ The judge ordered that he pay restitution in the amount of \$8,183.04, placed Mr. Barber on five years of probation and ordered a stayed imposition.⁶ If Mr. Barber pays the restitution and remains law abiding, the charge will be reduced to a misdemeanor.⁷

3. Mr. Barber testified he wrote the checks in late March and early April of 2011 in order to loan money to a relative who needed the money. He believed he could cover the checks either by having the relative pay him back or by getting an advance on his commission from a real estate deal that was scheduled to close within a few days of writing the checks. The relative did not pay him back, the real estate deal fell through, and the checks were dishonored.⁸

4. On April 24, 2013, Mr. Barber filed an application with the Department to renew his real estate license.⁹

5. On the license application, Mr. Barber answered “yes” in response to the question: “Have you ever been convicted of a crime, had a judgment withheld or deferred, or have you been charged with committing a crime?”¹⁰ The application defined “crime” to include felonies.¹¹ Mr. Barber e-mailed paperwork relating to his 2012 criminal conviction in Ramsey County District Court with his application.¹²

¹ Testimony (Test.) of Paul Barber.

² *Id.* It appears Mr. Barber’s license went “inactive” on January 5, 2012 and expired on June 30, 2012. See, Ex. 1 at 2.

³ *Id.*

⁴ *Id.*

⁵ Ex. 3.

⁶ *Id.*

⁷ Test. of Cheryl Costello.

⁸ Test. of P. Barber.

⁹ Ex. 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

6. On June 27, 2013, Mr. Barber's probation officer confirmed for the Department that he was current on his restitution payments and that he is in compliance with the terms and conditions of his probation.¹³

7. If Mr. Barber is granted a real estate license, he would have a job at Coldwell, Banker, Burnet's Stillwater Office.¹⁴

8. Cheryl Costello, senior investigator with the Department, reviewed Mr. Barber's application and the documentation relating to his 2012 conviction. She determined that his application should be denied. Ms. Costello based her decision on Mr. Barber's 2012 felony conviction, the fact that he will remain on probation until April of 2017, and that full restitution has not yet been made.¹⁵

9. A real estate agent has a fiduciary responsibility to his clients. The Department believes that, based on Mr. Barber's felony conviction for issuing dishonored checks, he should not be allowed to work in that capacity.¹⁶

10. The Respondent appealed the Department's decision to deny his license application and requested a hearing.

11. The Department issued a Notice of and Order for Hearing, Order to Show Cause, and Statement of Charges on October 23, 2013.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against the Respondent under Minn. Stat. §§ 14.50 and 45.027, subd. 7.

2. The Respondent received due, proper and timely notice of the charges against him, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all the relevant procedural legal requirements of law and rule.

4. The burden of proof in this proceeding is on Mr. Barber to show by a preponderance of the evidence that he should be granted a license.¹⁷

¹³ Ex. 4.

¹⁴ Test. P. Barber; Ex. 5.

¹⁵ Test. of C. Costello.

¹⁶ *Id.*

¹⁷ Minn. R. 1400.7300, subp 5.

5. The Commissioner of Commerce may deny an application for a real estate salesperson's license if the Commissioner finds that it is in the public interest to do so and the applicant has "engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner."¹⁸

7. Mr. Barber pled guilty to the felony offense of issuing dishonored checks.

8. Minn. Stat. § 45.027, subd. 10, specifies that "Chapter 364 [relating to rehabilitation of those convicted of crimes] does not apply to an applicant for a license...where the underlying conduct on which the conviction is based would be grounds for denial...of the license."

9. The underlying conduct on which Mr. Barber's convictions are based demonstrate that he is untrustworthy or otherwise incompetent or unqualified to act as a real estate salesperson under Minn. Stat. § 45.027, subd. 7(a)(4), and that he has "engaged in a fraudulent, deceptive, or dishonest practice" in violation of Minn. Stat. § 82.82, subd. 1(b). This conduct directly relates to the occupation for which the license is sought and warrants the denial of his license application. The occupation of a real estate salesperson requires trustworthiness, especially in matters involving the handling of client properties and money.

10. Mr. Barber has failed to demonstrate by a preponderance of the evidence that he is not in violation of the provisions cited above.

11. An Order denying Mr. Barber's real estate salesperson's license application would be in the public interest.

12. These Conclusions are reached for the reasons discussed in the Memorandum below. The Memorandum is incorporated into these Conclusions.

Based on the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

¹⁸ Minn. Stat. § 45.027, subd. 7(a)(4).

RECOMMENDATION

IT IS RECOMMENDED that the Department's denial of Paul Barber's application for a real estate salesperson's license be **AFFIRMED**.

Dated: December 16, 2013

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

Reported: Digitally recorded

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of the Commissioner of Commerce, 85th Seventh Place East, Suite 500, St. Paul, Minnesota 55101-2198, for information about the procedure for filing exceptions or presenting argument.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

MEMORANDUM

Mr. Barber fully disclosed his 2012 conviction for issuing dishonored checks when he submitted his application to renew his real estate salespersons' license. He contends the conviction stems from an isolated occurrence that will not happen again. Mr. Barber explained that he was trying to help a relative in need when he wrote the checks. He points to his 21-year career in real estate where there had been no complaints and no ethical violations. Mr. Barber notes his ability to make full restitution would be enhanced if he were granted a license. He maintains he should be found fit to be licensed as a real estate sales person.

The Department has demonstrated that the conduct underlying Mr. Barber's conviction is serious in nature and sufficiently related to licensure as a real estate salesperson to justify denial of his application at this time.¹⁹ Licensed real estate salespersons are required to demonstrate a history of honesty and integrity because they hold a position of trust with their clients and have access to clients' homes, money, and personal belongings. Respondent's felony-level conviction for issuing of dishonored checks reflects deceptive or dishonest acts in violation of Minn. Stat. § 82.35, subd. 1(b), and demonstrate that the Respondent is untrustworthy or otherwise unqualified to act as a licensed real estate salesperson under Minn. Stat. § 45.027, subd. 7(a)(4).

The Administrative Law Judge notes that although the misconduct on which Mr. Barber's convictions are based occurred over two years ago, he is still completing his probationary term for that offense and he is still making restitution. Respondent will continue to be on probation until April 27, 2017. Ms. Costello testified that "down the road" the Department's position on Mr. Barber's re-application might change.²⁰ It is possible that upon completion of probation, or perhaps even sooner, the Department may reach a different conclusion regarding the Respondent's fitness for licensure.

For all of the reasons above, the Administrative Law Judge concludes that it is appropriate to deny the Respondent's license application.

J. E. L.

¹⁹ Minn. Stat. § 45.027, subd. 10.

²⁰ Test. of C. Costello.